Supreme Court, U. S.
F I L E D
MAY 19 1975
MICHAEL RODAK, JR., CLERK

No. 74-54

In the Supreme Court of the United States

OCTOBER TERM, 1974

TRANSAMERICAN FREIGHT LINES, INC., PETITIONER

v.

BRADA MILLER FREIGHT SYSTEMS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

ROBERT H. BORK,
Solicitor General,
THOMAS E. KAUPER,
Assistant Attorney General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
CARL D. LAWSON,
Attorney,
Department of Justice,
Washington, D.C. 20530.

FRITZ R. KAHN,
General Counsel,
BETTY JO CHRISTIAN,
Associate General Counsel,
LLOYD JOHN OSBORN,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

INDEX

	Page
Question presented	1
Statement	2
Argument:	
Introduction and summary	5
I. The Commission's control and responsibility rules ordinarily permit indemnification clauses as long as the lessee retains ultimate control and responsibility to the shippers and the public	10
A. The control and responsibility rules are designed to prevent the illegal leasing of operating authority	11
B. Indemnification clauses do not negate the lessee's control and responsibility	14
II. Indemnification clauses do not conflict with the regulations' provision for safe operations	20
Conclusion	26

CITATIONS

Cases:	
Alfred v. *Major*, 314 F. Supp. 979, affirmed 470 F. 2d 132	4, 10, 11, 21
Allstate Insurance Co. v. *Alterman Transport Lines, Inc.*, 465 F. 2d 710	11
American Trucking Associations, Inc. v. *United States*, 344 U.S. 298	11, 21
Andrew G. Nelson, Inc. v. *United States*, 355 U.S. 554	6
Carolinc Casualty Insurance Co. v. *Transport Indemnity Co.*, 488 F. 2d 790	11

576-249—75——1

Cases—Continued

	Page
Carolina Freight Carriers Corp. v. *Pitt County Transportation Co.*, 492 F. 2d 243, petition for a writ of certiorari pending, No. 73–1750	11
Chicago, Rock Island & Pacific R.R. v. *Chicago, Burlington & Quincy R.R. Co.*, 437 F. 2d 6, certiorari denied, 402 U.S. 996	25
Denver Midwest Motor Freight, Inc. v. *Busboom Trucking, Inc.*, 190 Neb. 231, 207 N.W. 2d 368	10
Diamond Transportation System, Inc., Extension—Wisconsin and Oklahoma Origins, 117 M.C.C. 706	18
General Express. Inc. v. *Schreiber Freight Lines, Inc.*, 377 F. Supp. 1159	11
Great Northern Ry. v. *Merchants Elevator Co.*, 259 U.S. 285	19
Indiana Insurance Co. v. *Parr Trucking Service, Inc.*, 510 F. 2d 490	11
Jones Truck Lines, Inc. v. *Ryder Truck Lines, Inc.*, 507 F. 2d 100, petition for a writ of certiorari pending, No. 74–973	11
Kreider Truck Service, Inc., Extension—Lard Oils, 83 M.C.C. 565	6
Mellon National Bank & Trust Co. v. *Sophie Lines, Inc.*, 289 F. 2d 473	17
Performance of Motor Common Carrier Service by Riss & Co., Inc., 48 M.C.C. 327	13
Pyramid Motor Freight Corp. v. *Ispass*, 330 U.S. 695	19
Red Ball Motor Freight, Inc. v. *Shannon*, 377 U.S. 311	5
Reed v. *The Yaka*, 373 U.S. 410	19
Ryan Stevedoring Co. v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124	19, 20
Schlagenhauf v. *Holder*, 379 U.S. 104	19

Cases—Continued

	Page
S.W. Sugar & Molasses Co. v. *River Terminals Corp.*, 360 U.S. 411	19
Tanksley Transfer Co. Extension—Points in Four States, 110 M.C.C. 674	17, 18
United States v. *Western Pacific R.R. Co.*, 352 U.S. 59	19
Watkins Motor Lines, Inc. v. *Zero Refrigerated Lines*, 381 F. Supp. 363	11
Wellman v. *Liberty Mutual Insurance Co.*, 496 F. 2d 131	17
Weyerhaeuser Steamship Co. v. *Nacirema Operating Co.*, 355 U.S. 563	19–20
Statutes and regulations:	
Department of Transportation Act, Sec. 6(e), 80 Stat. 939, 49 U.S.C. 1655(e)	22
Longshoremen's and Harbor Workers' Compensation Act Amendments, 86 Stat. 1263, 33 U.S.C. (Supp. II) 905	20
Motor Carrier Act of 1935, 49 Stat. 543, as amended, 49 U.S.C. 301–327	6
Sec. 304(e)	22
Sec. 304(f)	7
Sec. 308(a)	6
Sec. 315	16, 21
49 C.F.R. 1.48	22
49 C.F.R. 389.4	22
49 C.F.R. Part 1057	2, 5, 24–25
Sec. 1057.3	4
Sec. 1057.3(a)	1, 4, 7, 14, 15
Sec. 1057.4	4, 14
Sec. 1057.4(a)(3)	7
Sec. 1057.4(a)(4)	4
Sec. 1057.4(c)	8, 21
Sec. 1057.4(e)	9, 21

Miscellaneous: Page

ALI, *Restatement of Contracts* (1933) 25
Coase, *The Problem of Social Cost*, 3 J. Law & Economics 1 (1960) 23
Comment, *Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule*, 40 U. Chi. L. Rev. 661 (1973) 23
6A Corbin, *Contracts* (1962) 25
Demsetz, *When Does the Rule of Liability Matter?*, 1 J. Legal Studies 13 (1972) 23
Ex Parte No. MC–43:
51 M.C.C. 461 11
52 M.C.C. 675 11
64 M.C.C. 361 11
68 M.C.C. 553 11
Prosser, *Handbook of the Law of Torts* (4th ed. 1971) 19

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–54

TRANSAMERICAN FREIGHT LINES, INC., PETITIONER

v.

BRADA MILLER FREIGHT SYSTEMS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION AS AMICI CURIAE

On October 15, 1974, the Court invited the Solicitor General to express the views of the United States. In response, the United States and the Interstate Commerce Commission filed a short memorandum supporting the petition for certiorari. Certiorari was granted on March 17, 1975. This brief elaborates upon the views expressed in our memorandum.

QUESTION PRESENTED

Whether 49 C.F.R. 1057.3(a)—which requires that regulated carriers, in order to lease equipment from another regulated carrier, must first agree "in writing that control and responsibility for the operation of

the equipment shall be that of the lessee"—prohibits the lessor from agreeing to indemnify the lessee for losses caused by the negligence of the lessor.

STATEMENT

Motor carriers with certificates of public convenience and necessity often lease equipment with which to carry the freight over their authorized routes. Such arrangements are governed by the Interstate Commerce Commission's equipment leasing regulations, 49 C.F.R. Part 1057. Part 1057 requires that control of and responsibility for the operation of the leased equipment must be assumed by the lessee under the certificate authorizing the operation.

On January 19, 1968, Brada Miller Freight Systems, Inc. ("Brada Miller") entered into a lease agreement with Transamerican Freight Lines, Inc. ("Transamerican"). Brada Miller, as lessor, provided the equipment and driver for a single trip from Detroit, Michigan to Kansas City, Missouri. Transamerican, the lessee, holds authority from the Commission to serve those points and the equipment was to be operated over Transamerican's route. The lease provided that Transamerican, during the term of the lease, would have control of the vehicle and would be responsible to the public and shippers for its operation.[1] The lease also provided that Brada Miller would indemnify Transamerican for any loss or expenses

[1] Paragraph 4 of the lease provides that Transamerican "shall have the control and responsibility for the operation of said equipment in respect to the public, shippers, and Interstate Commerce Commission * * *" (A. 16, Exh. 3).

"sustained by reason of any negligence or alleged negligence" on the part of Brada Miller or its employees, arising out of the operation of the equipment during the term of the lease.[2] The indemnification clause was in turn qualified by the proviso that Transamerican was fully responsible to the public for the operation of the leased equipment. For purposes of its motion for summary judgment Brada Miller conceded, as Transamerican alleged (Pet. App. A–4), that Transamerican had "complete control and responsibility for the tractor and trailer covered by the lease * * *." In short, the lease provided that as between Transamerican and Brada Miller, Brada Miller was responsible for its own negligence, but as between the public and Transamerican, Transamerican was responsible for Brada Miller's negligence as well as its own.

As the Commission's regulations required, Transamerican inspected the equipment before the trip and filed with the Commission a report indicating that the equipment was safe (A. 66–67, 89 (Temperley Dep. Exh. 2)). Transamerican also checked the medical report on Howard Hardrick, a driver employed by Brada Miller and furnished by Brada Miller for the trip (A. 75). There is no indication in the record that Hardrick was an unsafe driver.

During the trip Sandra Wear was injured when the leased vehicle struck her automobile. She filed suit against Transamerican and Brada Miller, alleging that the accident was caused by the negligence of the truck's driver (A. 5–6). Brada Miller and Trans-

[2] This clause is set out in full at pp. A–4 to A–5 of petitioner's brief.

american cross-claimed against each other. During the course of the trial, Transamerican and Sandra Wear settled their dispute for $80,000. Transamerican then amended its cross-claim against Brada Miller, seeking recovery of the amount paid in settlement and of the expenses incurred in defending the suit.[3]

The district court granted Brada Miller's motion for summary judgment. Following *Alford* v. *Major*, 470 F. 2d 132 (C.A. 7), it held that the indemnity clause violates the Commission's regulations requiring the lessee to assume full control and responsibility over the leased vehicle.[4]

Transamerican argued on appeal that under the lease it had assumed full control and responsibility for the operation of the tractor and trailer. The court of appeals concluded, however, that "control and cost bearing are * * * related" (Pet. App. A–12), so that the party bearing the costs is the party with control

[3] Diversity of citizenship remained after the settlement. Transamerican is incorporated and has its principal place of business in Michigan; Brada Miller is incorporated and has its principal place of business in Indiana.

[4] The district court concluded (Pet. App. A–3 to A–4) that the lease was governed by 49 C.F.R. 1057.4(a)(4), which specifies that a lease must "provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee * * *." Section 1057.3(a), not Section 1057.4(a)(4), is the applicable provision in this case because Transamerican leased the equipment from another authorized carrier. Section 1057.3(a) provides that the carriers must agree "in writing that control and responsibility for the operation of the equipment shall be that of the lessee * * *."

However, there is no difference in substance in the "control and responsibility" requirements of the two sections. Section 1057.3 merely exempts certain leases from requirements of Section 1057.4 not relevant to indemnification.

and responsibility. Because Brada Miller had agreed to bear the costs of its own negligence, the court below held, Brada Miller rather than Transamerican had assumed control and responsibility. The court therefore held that the indemnification clause was ineffective.

ARGUMENT

INTRODUCTION AND SUMMARY

1. Because of seasonal or day-to-day fluctuations in the demand for its services, a motor carrier may find itself without equipment adequate to enable it to operate to the full extent of its authority, or to transport particular freight offered by shippers. At the same time, certificated carriers, exempted carriers, private carriers and contract carriers may have surplus equipment that, if not used by another carrier, will stand idle or be returned to its origin without a revenue-producing load.[5] It is economically advantageous for these carriers to strike a bargain; one

[5] Exempt carriers (usually transporters of agricultural commodities) often transport their goods from the area of production to the market, but are unable to secure exempt traffic to return to their origin. Unless the vehicle is leased to a certificated carrier, it will be compelled to travel empty in one direction, with a concomitant waste of resources. Agricultural carriers also face severe seasonal fluctuations in the demand for their services, and their equipment might go unused for many months each year unless it could be leased to other carriers. Private carriers (firms providing their own transportation) and contract carriers (firms providing service under long-term contracts to particular shippers only) often encounter similar problems. See *Red Ball Motor Freight, Inc.* v. *Shannon*, 377 U.S. 311. A contract carrier also may desire temporarily to augment its equipment. Its leasing, too, is governed by 49 C.F.R. Part 1057.

576-249—75——2

carrier secures additional equipment with which to serve the shipping public, and the other carrier avoids the inconvenience and cost of idle equipment or the return of its equipment (and driver) to the origin without a shipment.

Although leases of equipment therefore are advantageous to the establishment and maintenance of an orderly and economical system of transportation, "leases" of operating authority are not. Under the Motor Carrier Act of 1935, 49 Stat. 543, as amended, 49 U.S.C. 301–327, only a properly certificated carrier may haul freight in interstate commerce. Each certificate carries limitations on routes, destinations, and classes of freight to be hauled. There is an important distinction between a lease of equipment from a lessor to a lessee, on the one hand, and an ostensible equipment lease in which a "lessee" with operating authority simply lends its name and certificate to a "lessor" that actually performs the transportation service.

Leases of operating authority would subvert many of the restrictions on operation required by the Motor Carrier Act and included in certificates of public convenience and necessity.[6] The Commission's control and

[6] A carrier is limited to specific types of goods carried over specified routes to designated locations, and may be limited to enumerated customers. See, *e.g.*, *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554 (stock in trade of drug stores); *Kreider Truck Service, Inc., Extension—Lard Oils*, 82 M.C.C. 565 (lard and lard oils in tank vehicles from East St. Louis, Missouri, to Memphis, Tennessee); 49 U.S.C. 308(a). If operating authority could be leased, firms could (by careful planning and cross-leasing) acquire each other's authority and become common carriers in fact.

responsibility regulations have been designed to prevent the lease of operating authority in the guise of a lease of equipment. In order to achieve this objective, these regulations require the lessee to ship the freight under its own bill of lading, to compensate the lessor on an established basis, to inspect the equipment, and to assume full control over and responsibility for the operation of the leased equipment.[7]

2. The Commission's control and responsibility regulations do not, however, require the lessee to operate the equipment itself. The lessor can perform that task by furnishing the driver as well as the equipment. Under the regulations and the Commission's decisions interpreting them the lessee must assume the responsibility for the shipment, and must have full authority to control that shipment. Subject to that authority and responsibility, however, it can allow the lessor to perform the ministerial tasks of moving the freight.

The Commission's regulations do not expressly prohibit indemnification clauses. The merits of indemnification have not been investigated by the Commission, and its "control and responsibility" regulations neither sanction nor forbid the practice. Just as mere

[7] 49 C.F.R. 1057.3(a) provides that when one authorized motor common carrier leases equipment to another, for transportation in the direction of a point the lessor is authorized to serve, most of these requirements (but not the inspection and control and responsibility requirements) do not apply.

The regulations also govern the permissible duration of leases. The duration and fixed rate provisions do not apply to certain exempted lessors. See 49 U.S.C. 304(f); 49 C.F.R. 1057.4(a)(3).

performance by the lessor of the physical operation of the leased equipment does not negate the lessee's "control and responsibility," a mere promise by the lessor to bear the costs of its own negligence does not offend the regulations. The indemnification clause does not, by itself, determine what tasks the lessor performs or who has the authority to control those tasks or who bears responsibility to the public if the tasks are not performed properly. These of course are questions of control and responsibility, rather than of the allocation of formal liability between the contracting parties, and are the primary focus of the Commission's regulations.

This does not mean, however, that indemnification agreements always are permissible under the regulations. Such agreements may be part of an overall arrangement between "lessor" and "lessee" that amounts to an illegal lease of operating authority rather than a legitimate lease of equipment. An indemnification clause might tip the balance and lead the Commission to conclude that the ostensible "lessor" of equipment in fact had assumed the role of providing unauthorized transportation services. But an indemnification clause, in and of itself, does not violate the Commission's control and responsibility regulations.

3. Although the principal purpose of the regulations pertaining to leased equipment was to prevent illegal leases of operating authority to the "lessors" of the equipment, the Commission also considered the implications of its regulations for the safe operation of the trucking industry. The inspection requirement of Section 1057.4(c) is addressed in part to an apprehen-

sion that lessors might furnish equipment less reliable than that of the certificated lessee. The regulations express a similar concern with respect to drivers (see 49 C.F.R. 1057.4(e)). And, of course, the requirement that the lessee assume control and responsibility is intended to ensure that a party directly answerable to the Commission is in charge of the operation.

The Bureau of Motor Carrier Safety of the Department of Transportation also is charged with assuring safety in motor transportation, and is concerned with the problems of unsafe equipment. The Bureau and the Commission agree, however, that the Commission's regulations are not directly concerned with, and neither condone nor forbid, indemnification agreements.

Even had the Commission specifically addressed the propriety of indemnification, it is by no means clear that it would have sought to prohibit the practice in all cases. Under certain circumstances an indemnification clause might help to induce the lessor properly to perform the ministerial tasks that, under the regulations, can be assigned to it. If it is responsible for the consequences of its own negligence, the lessor might well be more likely to exercise due care. In short, an indemnification clause might help the lessee influence the performance of the lessor, and thereby exercise control and responsibility over a lessor in physical control of the vehicle.

On the other hand, the objective of safe operation might be frustrated if the indemnification clause also required the lessor to indemnify the lessee for the lessee' negligence, but the clause in this case does

not do so. Transamerican, the lessee, therefore had ample incentive to perform a thorough inspection and undertake all of its other duties with due care. It may be that if Transamerican negligently inspected the vehicle or negligently permitted an unsafe driver (furnished by the lessor, Brada Miller) to drive it, Transamerican would be precluded by the Commission's regulations, by the indemnification clause itself, or by state common law, from recovering over against Brada Miller. But such a case is not presented here. As written, the indemnification clause does not so diminish Transamerican's incentives to provide safe transportation that the clause is invalid for that reason.

I

THE COMMISSION'S CONTROL AND RESPONSIBILITY RULES ORDINARILY PERMIT INDEMNIFICATION CLAUSES SO LONG AS THE LESSEE RETAINS ULTIMATE CONTROL AND RESPONSIBILITY TO THE SHIPPERS AND THE PUBLIC

As the foregoing introduction and summary indicates, this case requires the Court to interpret the "control and responsibility" requirements of the Interstate Commerce Commission's motor carrier equipment leasing regulations. The Court of Appeals for the Seventh Circuit (following its earlier decision in *Alford* v. *Major,* 470 F.2d 132) concluded that the Commission's regulations implicitly prohibit all agreements requiring one motor carrier to indemnify another for loss caused by the former.[8] Courts of ap-

[8] See also *Denver Midwest Motor Freight, Inc.* v. *Busboom Trucking, Inc.*, 190 Neb. 231, 207 N.W. 2d 368. The opinion below expressly states (Pet. App. A–10 to A–13) that *Alford* prohibits all indemnification clauses. One district judge in the Seventh Circuit, apparently unaware of the unpublished opinion below, has held in two cases that *Alford* permits indemnification agreements. See *Watkins Motor Lines, Inc.* v. *Zero Refrigerated Lines*, 381 F. Supp. 363 (N.D. Ill.) (interchange of equipment); *General Express., Inc.* v. *Schreiber Freight Lines, Inc.*, 377 F. Supp. 1159 (N.D. Ill.) (trip lease).

peals for four other circuits have reached the opposite conclusion. *Indiana Insurance Co.* v. *Parr Trucking Service, Inc.,* 510 F.2d 490, 493–494 (C.A. 6); *Jones Truck Lines, Inc.* v. *Ryder Truck Lines, Inc.,* 507 F.2d 100 (C.A. 6), petition for a writ of certiorari pending, No. 74–973; *Carolina Freight Carriers Corp.* v. *Pitt County Transportation Co.,* 492 F.2d 243 (C.A. 4), petition for a writ of certiorari pending, No. 73–1750; *Carolina Casualty Insurance Co.* v. *Transport Indemnity Co.,* 488 F.2d 790, 794 (C.A. 10) (by implication); *Allstate Insurance Co.* v. *Alterman Transport Lines, Inc.,* 465 F.2d 710 (C.A. 5).

A. The Control and Responsibility Rules Are Designed To Prevent the Illegal Leasing of Operating Authority

The equipment leasing regulations under consideration here were formulated in Ex Parte No. MC–43, a rule-making proceeding extending from 1950 to 1956. See 51 M.C.C. 461; 52 M.C.C. 675; 64 M.C.C. 361; 68 M.C.C. 553. The first formulation was considered by this Court and sustained in *American Trucking Associations, Inc.* v. *United States,* 344 U.S. 298.

This rule-making proceeding was addressed primarily to problems caused by single-trip leasing of vehicles by owner-operators. These owner-operators,

who held no interstate transportation authority and therefore were outside the jurisdiction of the Commission, often entered into arrangements with certificated carriers through which the carrier agreed, in effect, to lease its certificate to the owner-operator for a fixed percentage of the rate collected. Owner-operators would solicit business in their own names[9] (or sometimes, without informing them in advance, in the names of certificated carriers). The owner-operators would issue a bill of lading to the shipper and write a document in the form of a "lease." After completing the transportation, the owner-operator would remit to the certificated carrier a fixed percentage of the revenue and a copy of the "lease"; until that point the certificated carrier might know nothing of the arrangement. If an accident took place en route, or if the cargo were lost, the certificated carrier might (and often did) disclaim responsibility for the transportation taking place without its prior knowledge.

Using this trip-leasing device, the lessors evaded the Motor Carrier Act and Commission's rules, which comprehensively regulate which carriers are allowed to transport specific types of freight over established routes to particular destinations. Because many of the "trip leases" were arranged without the prior knowledge of the certificated carrier, it also was difficult to fix responsibility for noncompliance with particular directives or, when responsibility could be fixed, to

[9] Since owner-operators often completed the entire journey under their own names, injured or interested parties had some difficulty discovering the identity of the nominally responsible certificated carrier.

obtain compliance. As the Commission explained in *Performance of Motor Common Carrier Service by Riss & Co., Inc.*, 48 M.C.C. 327, 360:

> In any case of a person claiming to be a motor carrier through the use of the vehicles of others, it is of the utmost importance to regulation that it have and exercise direction and control of the operations and of the persons engaged therein. For otherwise an unworkable situation is created, that is, one, for example, in which neither the Commission nor the person claiming to be the carrier would have any immediate and direct control over safety, hours of service of employees, and other matters pertaining to safe, adequate, and efficient service, and the safe operation of vehicles on the highways, all of which were intended by the act. In other words, as to these important features of motor-carrier operation, our regulation thereof, as required by the act, would be negatived to an inoperative degree, as the actual operator would not be subject to our regulations or to the direction and control of the person claiming to be the carrier and subject to our jurisdiction.

In Ex Parte No. MC–43 the Commission formulated several rules that alleviated the problems associated with uncontrolled trip-leasing by unregulated owner-operators. The cornerstone of the remedy the Commission devised is a rule that all leases in which the lessor furnishes the driver must extend for a period of at least 30 days.[10] By setting a minimum duration

[10] There are a few exceptions for agricultural and other carriers often faced with empty back-hauls from permissible travel. See notes 5 and 7, *supra*.

for such leases, this rule eliminated the "hard core of the problem[,] * * * the owner-operator trip lease" (68 M.C.C. at 555). The Commission also provided that the lease must be in writing and negotiated in advance; that the equipment must be identified as that of the lessee, with a concomitant assumption of liability for damage; that the lease must provide for payment at a specified rate; that the lessee must conduct a safety inspection before taking possession of the equipment; and that the lease must expressly provide that complete control and responsibility for the operation of the equipment rests with the lessee. See 49 C.F.R. 1057.4.

When the lease involves two certificated carriers, as is the situation in this case, an owner-operator trip lease is not possible,[11] and Section 1057.3(a) therefore removes most of the requirements of Section 1057.4. However, although the 30-day minimum lease does not apply to such transactions, the inspection requirement, and the control and responsibility requirement, continue to apply.

B. Indemnification Clauses Do Not Negate the Lessee's Control and Responsibility

The Commission's regulations do not refer to indemnification clauses, and the question presented in this case—whether the presence of such a clause conflicts with a separate agreement in the lease that the

[11] "Owner-operator," as used by the Commission in Ex Parte No. MC-43, is a term of art that does not include regulated carriers, which, because they are directly subject to the Commission's authority, do not pose the problems associated with transient owner-drivers.

lessee will exercise full control and responsibility—was not directly addressed in Ex Parte No. MC-43.[12] The Commission submits that such clauses are not necessarily inconsistent with the lessee's assumption of full control and responsibility.

In this case the lease expressly provided that the lessee (Transamerican) would assume and exercise complete control over and responsibility for the operation of the leased vehicle. This is, at least formally, all that Section 1057.3(a) requires. Perhaps more important than the mere words assuming control and responsibility, however, is the lessee's express assumption of liability to the public and shippers for any harm or loss caused by the operation of the leased vehicle; the indemnity clause did not affect this responsibility, and dealt only with the relationship between the lessor and lessee themselves.

The Commission contemplated that allocations of operational control would occur between the contract-

[12] During the course of Ex Parte No. MC-43, some witnesses testified about the effects of indemnification of lessees by owner-operators. The Commission stated (52 M.C.C. at 690):

"Protection of the public through insurance is reduced, because certain carriers require owner-operators to bear a portion of the public-liability and property-damage insurance, and, in some instances, to assume part of the responsibility for cargo insurance and pay a portion of each loss and damage claim."

This comment has no bearing on indemnification agreements of the type presented in this case; it concerned only carriers that attempt to disclaim responsibility to the public for damage or injury. Such a disclaimer substantially negates the lessee's control and responsibility. The Commission did not discuss arrangements that, while acknowledging the lessee's liability to the public and shippers, allocate the burden between lessee and lessor.

ing parties. The regulations do not preclude lessors from providing the drivers of the leased vehicles. The provision of a driver, more than any other single act, leaves physical moment-to-moment "control" of the leased vehicle in the hands of the lessor. But this sort of control is control over ministerial tasks. It is not the "control and responsibility" with which the Commission was concerned in Ex Parte No. MC–43. The Commission's regulations prohibit the lessor from retaining control over the route and destination of the freight, and require that the operation be conducted under the lessee's name. They prohibit essentially ad-hoc arrangements that allow the "lessor," under the guise of leasing equipment to a certificated carrier, to perform the functions (solicitation of business, scheduling, and so on) of a common carrier. But the regulations do not prohibit the lessor from carrying out the tasks immediately related to the physical transportation of the freight.

As the Commission stated (52 M.C.C. at 681):

> * * * when an authorized carrier furnishes service in vehicles owned and operated by others, he must control the service to the same extent as if he owned the vehicles, but need control the vehicles only to the extent necessary to be responsible to the shipper, the public, and this Commission for the transportation.

Thus, the lessee must control the "service" completely, but need control the "vehicles" only to the extent necessary to be "responsible" to the shipper, the public, and the Commission.[13] Of course, this responsibility is

[13] See 49 U.S.C. 315 (certificated carriers must be financially responsible and post a bond or provide insurance to cover po-

not limited to the satisfaction of damage claims; the lessee (under whose control the service is provided) must take all reasonable steps to ensure that the entire operation is conducted safely. An indemnification clause is not, however, inconsistent with this scheme. It does not affect the "service" or ultimate responsibility to the public, the shippers, and the Commission, but relates more directly to those aspects of the operation of the vehicle that often are within the physical control of the lessor.

On several occasions since the conclusion of proceedings in Ex Parte No. MC–43, the Commission has applied the rules to concrete factual situations. It has twice considered an indemnification clause as one element among many demonstrating lack of control and responsibility, but it has never condemned such a clause in isolation. In *Tanksley Transfer Co. Extension—Points in Four States,* 110 M.C.C. 674, 678–679, a "lessor" took orders directly from shippers and picked up freight in its own name, was compensated by a division of the revenues rather than by a fixed rental, and shifted equipment indiscriminately between the "lessee's" use and its own. This combination of factors almost certainly would have led the Commission to conclude that the lessee was not exercising control and responsibility. The Commission remarked, in addition, that the lessor had agreed to

tential liability). Cf. *Mellon National Bank & Trust Co.* v. *Sophie Lines, Inc.*, 289 F. 2d 473 (C.A. 3) (the lessee is liable for the negligent operation of leased vehicles); *Wellman* v. *Liberty Mutual Insurance Co.*, 496 F. 2d 131 (C.A. 8) (lessee is responsible for operation of a leased vehicle, even when the operation violates the lease).

indemnify the lessee for any loss, and that the indemnity agreement reinforced the Commission's conclusion that the lessor was in complete control of the service offered. Similarly, in *Diamond Transportation System, Inc., Extension—Wisconsin and Oklahoma Origins,* 117 M.C.C. 706, 712–713, the Commission concluded that the "lessee" had shunned the requisite control and responsibility because the "lessor" conducted equipment inspections in the "lessee's" name, shipped goods under its own bill of lading and concluded a "lease" agreement only after the shipment was completed, and was compensated by a division of the revenues. As in *Tanksley,* an indemnification agreement was part of this pattern of conduct, which appeared to make the "lessee" a passive party doing no more than lending its certificate to transportation services performed entirely by the "lessor." *Diamond, Tanksley,* and all other cases considered by the Commission depended upon the cumulative effect of all of the circumstances. The regulations are not violated when, as here, the only circumstance tending to show lack of control is the indemnification agreement itself.[14]

[14] Although the Commission often has occasion to address the issue of compliance with its leasing regulations, neither party to this case has suggested that this determination is always within the primary jurisdiction of the Commission. Nor do we believe that such a contention would be correct.

Cases like the instant one arise out of ordinary tort actions in which one party, relying upon the contractual indemnity provision, impleads or cross-claims against another (or later brings a separate suit to recover over from the lessor). Similar tort and contract questions are traditionally resolved by courts. The Commission—by promulgating the regulations and through continuing proceedings before it—already has exercised its judgment and discretion under the Act. Once it has done so, it is properly a judicial task to apply the Commission's regulations and precedents to the concrete case before the court. See *S. W. Sugar & Molasses Co.* v. *River Terminals Corp.*, 360 U.S. 411, 420–421; *United States* v. *Western Pacific R.R. Co.*, 352 U.S. 59, 69; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U.S. 695, 707; *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291, 294.

Finally, we note that indemnity is commonly recognized in the law of torts, and often is available even in the absence of an express contractual agreement. If one of the lessee's drivers is at the controls of a truck, the lessee might be able to receive indemnity from that driver for any damage caused by the driver's negligence. Cf. *Schlagenhauf* v. *Holder,* 379 U.S. 104. When the lessee is a certificated carrier, this type of indemnity is neither more nor less in derogation of its "control and responsibility" than is a right of indemnity from the lessor who furnished the driver. See generally Prosser, *Handbook of the Law of Torts* 310–313 (4th ed. 1971).

The law of admiralty serves as a further example. The vessel (or its owner) owes the seamen an absolute duty to furnish seaworthy working conditions, and this duty, like the common carrier's duty to the public and its shippers, is not delegable. *Reed* v. *The Yaka,* 373 U.S. 410, 414–415. But if the unseaworthiness is caused by a third party, such as a stevedore, the vessel's owner can seek indemnity from that third party even in the absence of an agreement so providing. *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.,* 350 U.S. 124; *Weyerhaeuser Steamship Co.* v.

Nacirema Operating Co., 355 U.S. 563. As the Court observed in *Ryan*, an express indemnification clause would, of course, have been permissible (350 U.S. at 132).[15]

The principle is the same in both admiralty and motor transportation: although one party (the vessel's owner or the certificated carrier) is by law required to be fully in control of and responsible for conditions of the vessel or the vehicle, and bear all consequences of unseaworthiness or negligence, the party responsible in law may seek indemnity from the party responsible in fact. The indemnity clause would violate the Commission's rules only if accompanied by other indicia demonstrating that the lessor was in control of the "service" as well as of the physical operation of the vehicle.

II

INDEMNIFICATION CLAUSES DO NOT CONFLICT WITH THE REGULATIONS' PROVISION FOR SAFE OPERATIONS

At the time it considered and promulgated the motor carrier equipment leasing regulations, the Commission's predominant concern was the prevention of leases of operating authority under the guise of leases of equipment. One of the reasons that the Commission disapproved of such "leases" was its belief

[15] *Ryan* was partially abrogated by the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 86 Stat. 1263, 33 U.S.C. (Supp. II) 905. The amendments substitute a system of workers' compensation for a longshoreman's action against the vessel and the vessel's indemnity action against the stevedore. The amendments do not affect the law of indemnity except as it applied to longshoremen.

that leased equipment was not being operated in accordance with applicable safety regulations. See *American Trucking Associations, supra,* 344 U.S. at 305; Ex Parte No. MC–43, 52 M.C.C. at 686–696. As the district court observed in *Alford* v. *Major,* 314 F. Supp. 979, 983 (N.D. Ind.), affirmed, 470 F.2d 132 (C.A. 7), "[t]he Interstate Commerce Act [*sic*] was supposed to prevent accidents, as well as to provide financially responsible defendants in the event of their occurrence."

The Commission's regulations respond to both concerns. The lessee must inspect the vehicle in order to ensure that it is in safe operating condition (Section 1057.4(c)) and must make certain that the driver is familiar with applicable safety regulations (Section 1057.4(e)). The lessee, because it is charged with control and responsibility, is responsible to the public and shippers for any property damage or personal injury arising out of the operation of the leased vehicle (see note 13, *supra*), and it must carry adequate insurance, or make other provision for payment, whether or not it has recourse to the lessor (49 U.S.C. 315).[16]

The regulations do not refer to indemnification clauses. Each of the regulations applies whether or not the lease agreement contains an indemnification agreement, and the lessee can comply fully with each provision even though it seeks recourse against the

[16] The requirement that the lease be of a minimum of 30 days' duration (applicable to many leasing situations, although not to leases between certificated carriers) also promotes safe operation. Unlike the situation presented by a single-trip lease, the 30-day lease gives the lessee time to become acquainted with the maintenance requirements, if any, of particular vehicles.

lessor. The Commission therefore submits that, so long as the lessee has complied with each of the provisions of the regulations, it is in conformity with them even though it has contracted for indemnification.

The United States, which (through the Bureau of Motor Carrier Safety of the Department of Transportation)[17] is responsible for the enforcement of safety rules for the nation's transportation system, believes that appropriately drafted regulations of indemnification clauses would be desirable as a matter of public policy. Such regulations might provide the lessee with greater incentives to demand that the lessor furnish safe equipment and drivers, and, in response to such demands, would cause the lessors to repair equipment and institute additional safety maintenance programs in order to compete for leases. However, the United States agrees with the Commission that the Commission's present regulations are not addressed to, and neither forbid nor regulate the terms of, indemnity clauses.

The United States and the Commission also agree that a prohibition of indemnification might reduce the lessor's incentive to exercise due care and provide safe equipment under some circumstances. When the

[17] The Commission's duties relating to motor carrier safety were transferred to the Department of Transportation by Section 6(e) of the Department of Transportation Act, 80 Stat. 939, 49 U.S.C. 1655(e), and have been delegated to the Bureau of Motor Carrier Safety of the Federal Highway Administration by 49 C.F.R. 1.48 and 389.4. Although the Bureau has the power to enforce the safety rules, the Commission retains the power to make those rules. See 49 U.S.C. 304(e).

lessor is ultimately responsible for making whole any loss caused by unsafe equipment or its negligence, it can be expected to take any appropriate cost-justified safety precautions. It can attempt to reduce its potential liability by increasing its investment in safety.[18] The lessor may sometimes be in the better position to inspect the vehicle, note its deficiencies and safety needs over the long run, and engage in preventive maintenance necessary to assure an adequate level of safety (and hence lower payments in indemnification or insurance costs). The lessor can be expected to provide a safe driver since the lessor will be in a better position to detect and replace chronically unsafe drivers. To the extent that the prospect of ultimate liability produces greater care in operation, the

[18] See generally Comment, *Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule*, 40 U. Chi. L. Rev. 661 (1973), which advocates a system of joint liability. If both the lessor (an independent contractor) and the lessee are liable for harm caused by the independent contractor, the public will be more likely to recover because it will have two responsible parties. The lessor and lessee then are free to shift the ultimate liability between them by indemnification agreements; if the lessor can provide more safety at lower cost, the lessee will pay it to do so (by increasing the rental) and will receive an indemnification agreement in return. On the other hand, if the lessee is better able to provide for safe operation (for example, by inspecting the vehicles more rigorously), the lessor will "pay" it to do so by accepting a lower rental and by demanding an indemnification clause from the lessee. This allocation of ultimate liability to the most efficient accident-preventer is possible only so long as indemnification clauses are permitted. See also Coase, *The Problem of Social Cost*, 3 J. Law & Economics 1 (1960); Demsetz, *When Does the Rule of Liability Matter?*, 1 J. Legal Studies 13 (1972).

ultimate liability should rest with the lessor, as the marketplace has so assigned it in this case.

The usefulness of indemnification agreements, and the contribution they may (or may not) make to safe operation, will depend upon the type of leasing operation involved. When the driver is supplied by the lessor and the clause covers only the lessor's negligence, the case for indemnification is the strongest; when the lease is long term (so that the lessee will have full physical control of the vehicle), the lessee supplies its own driver, and the clause requires indemnification for the lessee's own negligence, the case is weakest. Appropriately drafted regulations might preclude the use of such clauses when they do not contribute to safe operation. It may be, on complete examination, that the Commission would conclude that indemnification should be regulated or totally forbidden. But it has not addressed the issue, and the regulations as written are not susceptible of distinctions among types of indemnification. A decision that the indemnity clause in this case is contrary to the Commission's regulations could have the effect of nullifying all indemnity clauses in all motor carrier leases.

We submit that the present regulations cannot be so interpreted. Although, when accompanied by other indications that the equipment lease is a sham, an indemnification agreement provides some evidence that the lessee has assumed less than the requisite amount of responsibility and control, an indemnification agreement standing by itself does not conflict with 49

C.F.R. Part 1057. The language and history of the regulations militate against an inference that the Commission intended to void indemnification agreements.[19]

[19] The law of every state permits indemnification agreements, although in some states it is illegal to agree to indemnify another party for the other's negligence. In most states it is illegal to agree to indemnify another for the other's intentional torts. See generally ALI, *Restatement of Contracts* §§ 572–575 (1933); 6A Corbin, *Contracts* § 1471 (1962).

In *Chicago, Rock Island & Pacific R.R. Co.* v. *Chicago, Burlington & Quincy R.R. Co.*, 437 F.2d 6, 10, certiorari denied, 402 U.S. 996, the Court of Appeals for the Seventh Circuit enforced an indemnification provision through which the Burlington recovered from the Rock Island for losses incurred on the Burlington's track and caused by the Burlington's faulty switching signal system. The court held that the indemnification agreement "represented an adjustment of the private relations between the two carriers but did not alter their duties to the public as common carriers."

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
THOMAS E. KAUPER,
Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
CARL D. LAWSON,
Attorney.

FRITZ R. KAHN,
General Counsel,
BETTY JO CHRISTIAN,
Associate General Counsel,
LLOYD JOHN OSBORN,
Attorney,
Interstate Commerce Commission.

MAY 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975